No. 92-1812

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

PEDRO ALVAREZ-SANCHEZ

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a confession given to federal authorities while a suspect is in state custody awaiting arraignment on state charges must be suppressed as a result of delay between the suspect's original arrest by state authorities and his eventual presentment on the federal crime to which he confessed.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-40a) is reported at 975 F.2d 1396. The order of the district court (App., *infra*, 41a-50a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1992. A timely petition for rehearing was denied on January 22, 1993. App., *infra*, 60a. On April 13, 1993, Justice O'Connor extended the time for filing a petition for a writ of certiorari

to and including May 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULE INVOLVED

In pertinent part, 18 U.S.C. 3501 provides:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession * * * shall be admissible in evidence if it is voluntarily given.
>
> * * * * *
>
> (c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

> (d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

In pertinent part, Rule 5(a), Fed. R. Crim. P., provides:

> An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, respondent was convicted on one count of fraudulently possessing counterfeit United States currency, in violation of 18 U.S.C. 472. App., *infra*, 2a. The court of appeals reversed. App., *infra*, 1a-40a.

1. On Friday, August 5, 1988, officers of the Los Angeles Sheriff's Department obtained a warrant to search respondent's residence for heroin, heroin paraphernalia, and other evidence of narcotics distribution constituting a felony under California law. The warrant was executed later that afternoon and resulted in the discovery and seizure of narcotics, as well as rent receipts in respondent's name. The state authorities also recovered a total of $2,260 in counterfeit United States currency. Respondent was ar-

rested based on his possession of the narcotics, and he was "booked" at approximately 5:40 p.m. He spent the weekend in the custody of state authorities. App., *infra*, 54a, 57a.

Because of the counterfeit currency found during the search, the Sheriff's Department contacted the United States Secret Service on Monday morning, August 8, 1988. At approximately 11:30 a.m., Secret Service Special Agents Paul Lipscomb and John Bozzuto arrived at the Sheriff's Department and took possession of the counterfeit currency from the state authorities. The federal agents were then taken to an interview room, where they were introduced to respondent. At the request of the agents, a Spanish-speaking deputy sheriff advised respondent of his *Miranda* rights and served as an interpreter. App., *infra*, 51a-52a, 54a-55a, 58a. Respondent stated that he understood his rights, that he knew "what this was all about" because he had been a police officer in Mexico, and that he was willing to talk to the agents and to sign a waiver of his rights. After respondent signed the waiver form, he admitted that he had known the currency was counterfeit, but he claimed that a friend had found it abandoned in a motel room. The interview was terminated shortly thereafter when respondent invoked his right to remain silent, explaining that he had no desire to implicate others. App., *infra*, 52a.

The Secret Service agents arrested respondent. They then took him from the Sheriff's Department to the Secret Service field office for booking, a drive that took approximately 55 minutes. Once at the field office, the agents took respondent's fingerprints and photographs and obtained a brief personal history. The agents also prepared a criminal complaint.

Those procedures took approximately three hours, owing in part to the need to obtain typing services and to procure a Spanish interpreter to elicit booking information from respondent. At approximately 2:30 p.m., Special Agent Lipscomb telephoned the court to advise that respondent was in federal custody and that he would be brought for arraignment before the magistrate that afternoon. The court clerk told Special Agent Lipscomb that the magistrate's calendar was full for the day, and directed the Secret Service to take respondent to the magistrate the following morning. Respondent was lodged for the evening in the federal detention center and was presented on the federal complaint on Tuesday, August 9, 1988. See 10/31/88 Tr. 10-16; App., *infra*, 52a-53a.

2. Respondent was indicted for violating 18 U.S.C. 472. He moved to suppress the statement he made while in the custody of the Los Angeles Sheriff's Department on the ground, *inter alia*, that the delay between his state arrest and federal presentment rendered the confession inadmissible under 18 U.S.C. 3501(c). The district court denied respondent's suppression motion. App., *infra*, 41a-50a. The court first rejected respondent's claim that he did not voluntarily waive his rights under *Miranda*. Turning to respondent's Section 3501(c) claim based on the delay in presenting him to a federal magistrate, the court concluded that suppression was not warranted in this case. The court explained:

> [T]here is no evidence in the instant case that the delay in arraignment was for the sole purpose of obtaining a confession or was the result of oppressive police practices prior to obtaining the confession, or that the delay otherwise caused the confession.

> Evidence * * * establishes that the defendant was taken into federal custody, transported, processed, fingerprinted and photographed immediately upon interrogation, and that arraignment was delayed until the next morning only because, due to the lateness of the day, the magistrate's calendar was full once booking was completed.

App., *infra*, 49a. The court also noted that respondent "offered no evidence [of] a collusive arrangement between state and federal agents for purposes of obtaining the confession," and that "[t]he delay *after* the confession and before [respondent's] federal arraignment obviously ha[d] no effect on the prior confession and would not render it inadmissible." *Id.* at 50a. Respondent was subsequently convicted after a jury trial at which the confession was admitted.

3. The court of appeals reversed. The court concluded that respondent's confession was obtained more than six hours after his arrest, and that the government therefore could not invoke the six-hour "safe harbor" period provided by Section 3501(c), during which voluntary confessions "shall not be inadmissible solely because of delay in bringing [the arrestee] before a magistrate." The court rejected the government's contention that time spent by a defendant in state custody should be charged to the federal government only when "the defendant can show evidence of collusion between local and federal authorities." App., *infra*, 20a-21a n.8. Instead, the court concluded that periods of state and federal custody "should always be aggregated" in calculating the period of pre-presentment delay. That conclusion rendered the six-hour "safe harbor" period unavail-

able in this case, because respondent's confession was not made within six hours of his arrest by state officers. *Ibid.*

The court then turned to an analysis of the options open to a court under 18 U.S.C. 3501 when a confession is made more than six hours after arrest. The court noted that several circuits have held that such confessions may be suppressed only if they are shown to be involuntary under Section 3501(a). App., *infra*, 11a-13a. The court did not follow that approach, however, because it appeared to believe that its earlier cases left open only two other alternatives. The court explained that some of its cases had required suppression of confessions made outside the six-hour "safe harbor" period based on supervisory rules developed by this Court before Section 3501 was enacted, whereas its decision in *United States* v. *Halbert*, 436 F.2d 1226 (9th Cir. 1970), and cases following *Halbert* had tempered that automatic rule by vesting trial courts with "discretion" to exclude confessions given more than six hours after arrest as "involuntary," even if the delay had no effect on the suspect's free will. App., *infra*, 15a-20a. The court stated that it was unnecessary to choose which line of circuit precedent should be deemed controlling, because respondent's confession was inadmissible under both approaches. *Id.* at 20a-23a.

The dissenting judge would have affirmed respondent's conviction. He found "no evidence that any delay in bringing [respondent] before the magistrate was used to lengthen the interrogation." App., *infra*, 40a. Because respondent clearly knew of the nature of the charges under investigation and readily admitted his involvement at the beginning of the inter-

rogation, the dissenting judge would have found the confession admissible. *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents two related questions of federal criminal procedure on which the circuits are divided. First, the Ninth Circuit concluded that a suspect's arrest on state charges qualifies as the "arrest or other detention" contemplated by 18 U.S.C. 3501. That conclusion conflicts with decisions of five other courts of appeals. Second, the court of appeals concluded that a confession given more than six hours after arrest may be suppressed solely to penalize the Government for the delay, and stated that suppression was warranted solely by the Monday-to-Tuesday delay that *followed* the confession in this case. That conclusion conflicts with decisions of other courts of appeals holding that 18 U.S.C. 3501(a) mandates admission of any confession that "is voluntarily given."

1. a. The court of appeals' decision that state and federal custody must "always" be aggregated for purposes of assessing pre-arraignment delay conflicts with the text of Section 3501(c). That statute provides that a voluntary confession given by a suspect within six hours of his "arrest or other detention" is not inadmissible solely because of delay in taking him "before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States." That six-hour "safe harbor" period may be extended if the delay is reasonable considering, among other things, "the distance to be traveled to the nearest * * * such magistrate or other officer." The statute therefore plainly contemplates that a suspect's "arrest or other detention" must be of the kind that triggers an appearance before a judicial officer authorized to set bail for those charged with *federal* crimes—*i.e.*, that the only relevant arrests are those made for violations of federal law. Because respondent was not under "arrest or other detention" for a federal offense when he confessed, his confession was not suppressible under Section 3501. See 18 U.S.C. 3501(d).

Nothing in Rule 5, Fed. R. Crim. P., supports the Ninth Circuit's conclusion that an arrest on state charges triggers a duty to arraign the suspect speedily on any federal charges. App., *infra*, 22a n.9. Rule 5 requires that an arrested suspect be taken without unnecessary delay to "the nearest available federal magistrate" or to a state judge authorized to set bail for federal offenses under 18 U.S.C. 3041. As its text makes clear, the Rule is part of "[t]he scheme for initiating a *federal* prosecution." *Mallory* v. *United States*, 354 U.S. 449, 454 (1957) (emphasis supplied). Thus, like Section 3501, the Rule is addressed to arrests for violations of federal law, and does not control the actions of state officers enforcing their own laws. Cf. *Gallegos* v. *Nebraska*, 342 U.S. 55, 63-65 (1951) (plurality opinion). See also *United States* v. *Davis*, 437 F.2d 928, 931 (7th Cir. 1971) (Stevens, J.) ("Rule 5(a) prescribes the procedure to be followed when a suspect is taken into federal custody," and therefore "it was permissible for the F.B.I. agent to question [the defendant] while he was in state custody."). Indeed, the Rule is not violated by the failure to arraign a suspect who is questioned about a new federal crime while he is already in lawful custody for other charges under federal authority. See *United States* v. *Carignan*, 342 U.S. 36, 43-45 (1951) ("Rule 5 * * * does not

apply in terms, because Carignan was neither arrested for nor charged with the murder when the confession to that crime was made."). See also *Abel* v. *United States*, 362 U.S. 217, 225-230 (1960).

Rejection of the Ninth Circuit's conclusion is also required by the need to avoid the anomalous consequences that would follow from its ruling that state arrests trigger ~~federal~~ arraignment obligations—obligations enforced through a suppression remedy. *See United States* v. *Brown*, 333 U.S. 18, 26-27 (1948). As this case demonstrates, federal officers may not learn of a suspect's existence, much less of the possibility that he committed a federal crime, until the suspect has been lawfully detained for some time on state-law charges. Forbidding federal courts from admitting statements obtained during such lawful state custody serves none of the deterrent purposes of the exclusionary rule. See, *e.g.*, *United States* v. *Carignan*, 342 U.S. at 41-45; *Illinois* v. *Krull*, 480 U.S. 340, 347-355 (1987). See also *Abel* v. *United States*, 362 U.S. at 240. In addition, as this case also demonstrates, the government may well lack grounds for a federal charge against a person who is already in state custody absent "further inquiry and investigation." *United States* v. *Carignan*, 342 U.S. at 44; see also *Mallory* v. *United States*, 354 U.S. at 455. Here, the federal crime on which respondent was convicted requires proof that the defendant was aware of the counterfeit nature of the currency, see 18 U.S.C. 472, an element on which (absent inquiry of respondent) there might have been insufficient proof on the facts known to the Secret Service agents when they first approached respondent.

b. The rule adopted by the Ninth Circuit is also inconsistent with this Court's treatment of state custody before Section 3501(c) was enacted. In *McNabb* v. *United States*, 318 U.S. 332, 341-347 (1943), this Court "[i]n the exercise of its supervisory authority over the administration of criminal justice in the federal courts," *id.* at 341, held inadmissible confessions obtained as the direct result of federal officers' failure to comply with a statute mandating the speedy arraignment of suspects. Following the adoption of Rule 5, which replaced the statute on which *McNabb* relied, the Court reaffirmed the *McNabb* rule in *Mallory* v. *United States*, 354 U.S. at 453-456.

Consistent with its roots in this Court's supervisory authority, the *McNabb-Mallory* rule focused on depriving federal officers of the fruits of their wrongdoing. The Court did not apply the doctrine to confessions obtained by state officers, see *Gallegos* v. *Nebraska*, 342 U.S. at 63-65 (plurality opinion), except when state officers illegally detained a suspect at the behest of federal agents. Thus, in *Anderson* v. *United States*, 318 U.S. 350 (1943), decided the same day as *McNabb*, the Court required suppression of a confession where the record disclosed "a working arrangement" between federal and state officers that enabled federal officers to secure the confession "improperly." 318 U.S. at 356. Applying the rule of the *Anderson* case, the Second Circuit in *United States* v. *Coppola*, 281 F.2d 340, 344-345 (2d Cir. 1960) (en banc), upheld the admission of a confession made by a suspect to a federal agent while the suspect was in the custody of the local police. The suspect had been arrested by the local police on their own initiative, but on a crime both governments were investigating. This Court granted certiorari, heard argu-

ment, and summarily affirmed. See *Coppola* v. *United States*, 365 U.S. 762 (1961) (*per curiam*).[1] Thus, by the time Section 3501(c) was enacted in 1968, the law was well settled that, absent collusion, confessions made to federal officers by suspects in state custody did not trigger federal arraignment obligations.

c. Because neither the statutory language nor the supervisory rule it replaced lends any support to the Ninth Circuit's view that state and federal custody must "always" be aggregated, five courts of appeals that have considered that issue since Section 3501 was enacted have disagreed with that conclusion. Those courts have concluded that Section 3501(c) either is not triggered at all by a state arrest, or is triggered by such an arrest only when the defendant demonstrates that federal and state authorities colluded with the specific purpose of depriving him of a speedy federal arraignment. See *United States* v. *Carter*, 910 F.2d 1524, 1528 (7th Cir. 1990), cert. denied, 111 S. Ct. 1628 (1991); *United States* v. *Barlow*, 693 F.2d 954, 957-959 (6th Cir. 1982), cert. denied, 461 U.S. 945 (1983); *United States* v. *Van*

[1] Significantly, the petitioner in *Coppola* had urged not only the existence of an improper "working arrangement" under *Anderson*, but also that the "working arrangement" requirement for inadmissibility should be overruled in light of this Court's decision in *Elkins* v. *United States*, 364 U.S. 206 (1960). See Brief for Petitioner at 26-33, *Coppola* v. *United States*, No. 153 (O.T. 1960). *Elkins* held that evidence seized by state officers in violation of the Fourth Amendment is not admissible in federal prosecutions, even if the federal government did not participate in the constitutional violation. This Court rejected that argument. See *Coppola* v. *United States*, 365 U.S. at 762 ("We find no merit in the other argument advanced by the petitioner.").

Lufkins, 676 F.2d 1189, 1192-1193 (8th Cir. 1982); *United States* v. *Torres*, 663 F.2d 1019, 1023-1024 (10th Cir. 1981), cert. denied, 456 U.S. 973 (1982); *United States* v. *Rollerson*, 491 F.2d 1209, 1212 (5th Cir. 1974). By departing from the uniform rule on this issue, the decision of the court of appeals in this case, if allowed to stand, will cause confusion on an issue of federal criminal procedure that arises with some frequency.[2] In addition, it will hamper effective cooperation with state authorities in a circuit that accounts for a large number of federal criminal cases. This Court's review is necessary to resolve the conflict among the circuits and restore uniformity in the construction of Section 3501(c).

2. The court of appeals also concluded that a confession given more than six hours after arrest may be suppressed solely to penalize the government under the *McNabb-Mallory* rule—either as a pure exercise of supervisory power or by "balancing" the voluntariness of the confession against the "unreasonableness" of the delay. App., *infra*, 21a-23a & n.10. Reversal of the Ninth Circuit's erroneous conclusion that the relevant arrest was effected by California authorities will obviate the need to consider that additional question. But even if the Court were to agree with the court of appeals that the state arrest is the pertinent "arrest" for purposes of Section 3501(c), the court of appeals' decision would still warrant plenary review for two independent reasons.

[2] See, *e.g.*, *United States* v. *White*, 979 F.2d 539, 543 (7th Cir. 1992); *United States* v. *Watson*, 591 F.2d 1058, 1061-1062 (5th Cir.), cert. denied, 441 U.S. 965 (1979); *United States* v. *Jensen*, 561 F.2d 1297, 1299 (8th Cir. 1977); *United States* v. *Gaines*, 555 F.2d 618, 622 (7th Cir. 1977); *United States* v. *Elliott*, 435 F.2d 1013, 1015 (8th Cir. 1970).

a. Section 3501(c) does not prescribe what consequences must follow when a confession is made outside the six-hour "safe harbor" period. The statute provides only that some confessions shall be admitted; it does not state that all other confessions must be suppressed. See *United States* v. *Halbert*, 436 F.2d at 1232; see also *United States* v. *Marrero*, 450 F.2d 373, 378 (2d Cir. 1971), cert. denied, 405 U.S. 933 (1972). As the Ninth Circuit noted in this case, see App., *infra*, 13a-15a, some courts of appeals have concluded that non-safe harbor confessions may be suppressed under the *McNabb-Mallory* rule, while other circuits have concluded that Congress overruled *McNabb-Mallory* by enacting 18 U.S.C. 3501(a), which provides that "a confession * * * shall be admissible in evidence if it is voluntarily given." See also *United States* v. *Christopher*, 956 F.2d 536, 538-539 (6th Cir. 1991) (collecting authorities), cert. denied, 112 S. Ct. 2999 (1992). We believe the text of Section 3501(a), and its legislative history,[3] clearly reflect Congress's intent to reject the *McNabb-Mallory* rule. The Ninth Circuit therefore erred in applying that doctrine in this case.[4]

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[3] The Senate Report that accompanied Section 3501(a) stated: "These decisions have resulted in the release of criminals whose guilt is virtually beyond question. * * * The general public is becoming frightened and angered by the many reports of depraved criminals being released to roam the streets in search of other victims. For example, the infamous Mallory was convicted on another rape charge shortly after his first rape conviction was reversed by the Supreme Court." S. Rep. No. 1097, 90th Cong., 2d Sess. 41 (1968).

[4] The need for plenary review in this case is not lessened by the fact that, in a footnote at the end of its opinion, the Ninth Circuit purported to find respondent's confession "involuntary" under its earlier decision in *Halbert*. The Ninth Circuit's discussion of *Halbert* and its progeny, see App., *infra*, 15a-17a, 22a, leaves no doubt that its concept of "involuntariness" includes factors completely unrelated to free will, and that (as construed by the court of appeals in this case) the *Halbert* approach permits suppression when a confession is voluntary in the traditional sense. Indeed, the Ninth Circuit's conclusion that respondent's confession was "involuntary" was based on a "balancing" of factors affecting free will against the perceived "unreasonableness" of the government's conduct. App., *infra*, 23a n.10. That analysis is erroneous. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225-226 (1973).

b. Even assuming the *McNabb-Mallory* rule remains the law, the Ninth Circuit's application of the rule in this case is contrary to this Court's decision in *United States* v. *Mitchell*, 322 U.S. 65 (1944).[5] The Ninth Circuit expressly rested its decision to suppress on the purported misconduct of federal agents in delaying respondent's arraignment from Monday afternoon to Tuesday morning—*after* respondent had given the confession at issue. App., *infra*, 21a. Nothing in the record supports the court of appeals' conclusion that

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[5] In fact, because respondent was advised of his rights as required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and voluntarily waived those rights, he should be barred from any claim under *McNabb-Mallory*. As several circuits have concluded, see, *e.g.*, *United States* v. *Salamanca*, Nos. 91-3057 & 91-3058 (D.C. Cir. Apr. 9, 1993), slip op. 8-9; *United States* v. *Barlow*, 693 F.2d at 959; *United States* v. *Indian Boy X*, 565 F.2d 585, 591 (9th Cir. 1977), cert. denied, 439 U.S. 841 (1978); *O'Neal* v. *United States*, 411 F.2d 131, 136-137 (5th Cir.), cert. denied, 396 U.S. 827 (1969), *Miranda* warnings supply the words of "caution" that the Court found lacking in *McNabb* and *Mallory*. See *Mallory* v. *United States*, 354 U.S. at 455.

the delay in presenting respondent was the result of misconduct; on the contrary, the record is clear that the delay was caused by the congestion in the magistrate's docket, and that respondent was not interrogated and made no statement during that delay. In any event, *Mitchell* holds that post-confession delay, even if improper, does not affect the admissibility of a confession. In *Mitchell*, the defendant confessed shortly after his arrest, but his arraignment was then illegally delayed for eight days. This Court reversed an order suppressing the confession, explaining:

> [T]he illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures. These, we have seen, were not elicited through illegality. Their admission, therefore, would not be use by the Government of the fruits of wrongdoing by its officers. Being relevant, they could be excluded only as a punitive measure against unrelated wrongdoing by the police. Our duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining misconduct.

United States v. *Mitchell*, 322 U.S. at 70-71. That understanding, which comports with the reasons for the exclusionary rule, has informed the construction given by other circuits (and by the Ninth Circuit in earlier cases) to the term "delay" in Section 3501(c). See, *e.g.*, *United States* v. *Cruz Jimenez*, 894 F.2d 1, 8 (1st Cir. 1990); *United States* v. *Montes-Zarate*, 552 F.2d 1330, 1331 (9th Cir. 1977), cert. denied, 435 U.S. 947 (1978). The Ninth Circuit's ruling departing from settled law in this area warrants plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1993

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

PEDRO ALVAREZ-SANCHEZ, DEFENDANT-APPELLANT

No. 89-50060
D.C. No. 88-0671-CBM

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted
November 9, 1990—Pasadena, California

Filed September 15, 1992

Before: Dorothy W. Nelson and Stephen Reinhardt, Circuit Judges, and Edward Dean Price,* Senior District Judge.

Opinion by Judge Reinhardt; Dissent by
Senior District Judge Price

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* The Honorable Edward Dean Price, Senior District Judge for the Eastern District of California, sitting by designation.

OPINION

REINHARDT, Circuit Judge:

The defendant, Pedro Alvarez-Sanchez, was convicted after a jury trial of possession of counterfeit government obligations in violation of 18 U.S.C. § 472. During the trial, the government introduced in evidence a confession obtained while the defendant was in custody. The defendant had moved to suppress his confession on the ground that it was inadmissible under 18 U.S.C. § 3501 due to the delay between his arrest and arraignment. The district court denied the defendant's motion, and he appeals that denial. We review de novo the district court's decision to admit the confession. *See United States v. Gonzalez-Sandoval*, 894 F.2d 1043, 1048 (9th Cir. 1990); *United States v. Wilson*, 838 F.2d 1081, 1085-86 (9th Cir. 1988). We reverse and remand.

I

The facts, as found by the district court in its denial of the defendant's suppression motion, are relatively simple. On Friday August 5, 1988, Alvarez-Sanchez was arrested by Los Angeles Sheriff's deputies on narcotics charges during the execution of a search warrant on his residence. During the search, the deputies recovered $2,260 in counterfeit money; the Secret Service was notified. Although the state never pursued any narcotics or other prosecution against Alvarez-Sanchez, he remained in state custody throughout the weekend. On Monday August 8, 1988, while still in state custody, Alvarez-Sanchez was interviewed by federal agents, one of whom was apparently fluent in Spanish. After agreeing to

waive his *Miranda* rights, Alvarez-Sanchez confessed to knowing possession of the counterfeit money. Later that afternoon, the federal agents took custody of the defendant, and the next morning, Tuesday August 9, he was arraigned before a federal magistrate.

II

The defendant argues that his confession was inadmissible because it was obtained during a period of unreasonable pre-arraignment delay. Rule 5(a) of the Federal Rules of Criminal Procedure requires that an arrested person be arraigned before a magistrate "without unnecessary delay." The right to a speedy arraignment codified in Rule 5(a) has been recognized to serve at least three important interests; it: (1) "protect[s] the citizen from a deprivation of liberty as a result of an unlawful arrest by requiring that the Government establish probable cause," (2) "effectuate[s] and implement[s] the citizen's constitutional rights by insuring that a person arrested is informed by a judicial officer" of those rights, and (3) "minimize[s] the temptation and opportunity to obtain confessions as a result of coercion, threats, or unlawful inducements." 113 Cong.Rec. 36,067 (1967); *see also McNabb v. United States*, 318 U.S. 332, 343 (1943) ("The purpose of this impressively pervasive requirement of criminal procedure [that of prompt arraignment] is plain. . . . The awful instruments of the criminal law cannot be entrusted to a single functionary."). Alvarez-Sanchez's case presents us with the problem of determining the circumstances under which the failure to arraign an arrestee within a reasonable time should result in the suppression of his confession.

Nearly fifty years ago, the Supreme Court determined that one appropriate remedy for violations of Rule 5(a) is to suppress confessions obtained during an unnecessary delay in arraignment. *See McNabb*, 318 U.S. at 341. In a line of decisions culminating in *United States v. Mallory*, 354 U.S. 449 (1957), the Supreme Court adopted a general exclusionary rule that rendered inadmissible all confessions obtained during a detention in violation of Rule 5(a). This rule was not as severe as it seemed, however, as not all delays in arraignment violate Rule 5(a)—only "unnecessary delays." As long as the delay was reasonable, it did not violate Rule 5(a). *See, e.g., Muldrow v. United States*, 281 F.2d 903, 905 (9th Cir. 1960); *Williams v. United States*, 273 F.2d 781, 798 (9th Cir. 1959), *cert. denied*, 362 U.S. 951 (1960). Suppression was required only "when the federal officers cannot justify their failure to promptly bring the accused before a committing magistrate, or when the federal officers delay arraignment in order to obtain evidence from the accused." *Smith v. United States*, 390 F.2d 401, 403 (9th Cir. 1968); *Cote v. United States*, 357 F.2d 789, 793 (9th Cir.), *cert. denied*, 385 U.S. 883 (1966). The rule was clear, however, with regard to delays deliberately incurred in order to allow investigating officers time to interrogate the accused—any confession obtained would have to be suppressed. *See Upshaw v. United States*, 335 U.S. 410, 414 (1948).

The continued vitality of the *McNabb-Mallory* remedy for Rule 5(a) violations was made uncertain, however, when in 1968 Congress enacted statutory provisions regarding the admissibility of confessions in federal criminal prosecutions, which provisions are

codified at 18 U.S.C. § 3501 and the text of which is set off in the margin.[1] One of the purposes of this

[1] (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit

enactment was to limit the *McNabb-Mallory* rule by allowing certain pre-arraignment confessions to be admitted notwithstanding the presence of a Rule 5(a) violation. *See United States v. Halbert*, 436 F.2d 1226, 1231 (9th Cir. 1970). Unfortunately, the text of § 3501 is confusing and has given rise to uncertainty and disagreements among the circuits over the proper application of the provision. *See United States v. Perez*, 733 F.2d 1026, 1034 (2d Cir. 1984) (discreetly describing interpretation of the act as "somewhat murky"). The degree to which the operation of the *McNabb-Mallory* rule has been curtailed is unquestionably *not* clear from the plain language of the statute.

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persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Two sections of § 3501, sections (a) and (c), appear to address the role of pre-arraignment delay in determining the admissibility of confessions obtained during such delay.[2] The most elaborate, and pertinent, is § 3501(c). That section states that a confession obtained during a pre-arraignment detention "shall not be inadmissible solely because of delay in [arraignment] if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention." The clear effect of this provision is to create a six-hour "safe harbor" during which a confession will not be excludable on the basis of the *McNabb-Mallory* rule. The section also provides that the permissible time for arraignment is extended "in any case in which the delay in [arraignment] is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer." Section 3501(c) is designed to allow the *McNabb-Mallory* rule to operate only when the delay in arraignment exceeds the greater of six hours or the time deemed reasonable by the court in light of the available means of transportation and the distance to the nearest magistrate. *See Perez*, 733 F.2d at 1031. Another way of putting

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[2] In fact, a third section, § 3501(b), also addresses delay in arraignment. Section (b) states that a court "shall take into consideration . . . the time elapsing between arrest and arraignment." However, the primary purpose of the section appears to be to aid courts in making voluntariness determinations under section (a).

it is that § 3501(c) modified the right to speedy arraignments so that delays of less than six hours or delays that are necessary in light of the logistics involved should be considered reasonable *per se* but left unaltered the *McNabb-Mallory* requirement that all confessions given during an *unreasonable* delay in arraignment should be suppressed.

The other section that appears to affect the *McNabb-Mallory* rule is § 3501(a). This section states that "[i]f the trial judge determines that the confession was voluntarily made it shall be admitted in evidence." If, as this language suggests, the section renders the admissibility of a confession dependent only on its voluntariness, then the *McNabb-Mallory* rule is eliminated entirely. Although a prolonged detention *prior to a confession* may weaken a person's will and thereby render a confession involuntary, delay in *arraignment* (which includes both pre- and post-confession delay) does not necessarily affect the voluntariness with which a confession is given. Further, because involuntary confessions are rendered inadmissible by the Constitution regardless of any additional Rule 5(a) violation, *see e.g., Blackburn v. Alabama*, 361 U.S. 199, 206-07 (1960), *McNabb-Mallory* would be purely superfluous. In short, § 3501(a) literally construed would make delay in arraignment that violates Rule 5(a) irrelevant to the admissibility of a confession.

Section 3501 is one of the many statutes, however, which provide strong evidence of the truth of Judge Learned Hand's simple aphorism that "[t]here is no surer way to misread any document than to read it literally." *Guiseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (L. Hand, J., concurring), *aff'd*, 324 U.S. 244 (1945); *see also United States v. Monia*,

317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting) ("The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification."). The difficulty with construing § 3501(a) literally—aside from the obvious problem that it would leave violations of speedy arraignment rights remediless—is that to do so would create a clear conflict with § 3501(c) and would render the latter section meaningless. According to section (c), a court is forbidden to suppress a confession solely on the basis of prearraignment delay *only* when the confession is given within six hours of arrest or when the delay in arraignment is due to the distance to the nearest magistrate. But a literal reading of section (a) forbids a court to suppress a confession solely on the basis of prearraignment delay under *all* circumstances. As the Second Circuit has noted, such a construction of section (a) "reads subsection (c) out of the statute." *Perez*, 733 F.2d at 1031; *see also United States v. Erving*, 388 F.Supp. 1011, 1016 (W.D.Wis. 1975).

Courts must not make a fetish of construing statutes in a literal fashion. Our role is not that of a super-grammarian obsessed with the plain meaning of language but rather that of perceptive diviner of congressional intent. *See Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1453 (9th Cir. 1992). In such a role, if possible, "effect shall be given to every clause and part of a statute." *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932). Thus, the Supreme Court has held that a court should reject the literal interpretation of a section of an enactment when that interpretation would render a different section meaningless. *See Mountain States Tel. &*

Tel. v. Pueblo of Santa Ana, 472 U.S. 237, 250 (1985). Accordingly, we reject a literal interpretation of § 3501(a)—in light of the provisions of § 3501(c), there must be circumstances in which delay in arraignment will require suppression of a confession regardless of the voluntariness of the confession. *See Perez*, 733 F.2d at 1032; *United States v. Manuel*, 706 F.2d 908, 913 (9th Cir. 1983) ("Section 3501(c), by implication, provides that unreasonable pre-arraignment delay can provide the sole basis for a finding of involuntariness, if the delay exceeds six hours."). The next question, of course, is—what circumstances?

We begin our analysis of the question by reviewing the approaches to § 3501 adopted by other circuits. Although all the opinions we have reviewed consider pre-arraignment delay in determining the admissibility of confessions, the methods by which the circuits perform this function can be divided into two distinct categories. One category involves constructions that attempt to harmonize sections (a) and (c) by expanding the meaning of the term "voluntary" as used in section (a) to include consideration of a factor unrelated to free will—specifically, pre-arraignment delay. The other category involves constructions that recognize that sections (a) and (c) were addressed to different matters—the former to concerns regarding the confessor's free will and the implementation of *Miranda*, and the latter to concerns regarding delay in arraignment and the implementation of *McNabb-Mallory*. While the former approach understandably tends to create confusion regarding the purpose of the two sections, the latter permits them to be analyzed separately and coherently.

The most primitive version of the first approach—the "expanded voluntariness" category—has been adopted by the Sixth Circuit, which resolved the conflict between sections (a) and (c) by holding simply that "[unnecessary delay] is one of five relevant factors which the trial judge must consider in determining voluntariness." *United States v. Mayes*, 552 F.2d 729, 734 (6th Cir. 1977). The resolution is puzzling, however, because the court also stated that "unnecessary delay, in and of itself, is not sufficient to justify suppression of an otherwise voluntary confession under 18 U.S.C. § 3501(a)." *Id.* As explained above, the absolute bar on suppressions based solely on delays in arraignment, as adopted by the Sixth Circuit, conflicts with section (c)'s command that a confession not be suppressed "solely because of delay in [arraignment]" if the confession falls within the six hour safe harbor. The Sixth Circuit's approach does, however, have the superficial benefit of apparent obedience to § 3501(a)'s command that voluntariness be the touchstone of admissibility under that section.

Yet, this obedience is nothing more than apparent; it makes "voluntariness" the touchstone only by distorting the meaning of that term. As we have already noted, the delay in arraignment (as opposed to the delay during the pre-confession period) is irrelevant to the determination whether the confession was given with a free will. Worse still, in assessing "voluntariness" *Mayes* insists upon a consideration only of *unnecessary* delay. The reasons for the delay —whether the delay was necessary or unnecessary— have no bearing, of course, on the confessor's state of mind. *See Perez*, 733 F.2d at 1031 ("[T]he government's excuses for the delay have no logical or legal relevance to the defendant's voluntariness [in giving

the confession]."); *United States v. Shoemaker*, 542 F.2d 561, 563 (10th Cir.), *cert. denied*, 429 U.S. 1004 (1976).

Notwithstanding the provisions of section (b), the problem with expanding the definition of voluntariness to include delay in arraignment is that it provides no guidance in determining how the delay is to be weighed: to order a court to consider unnecessary delay in arraignment in determining the voluntariness of a confession is to command it to engage in a wholly non-rational exercise. Because delay in arraignment (or at least the post-confession portion of that delay) does not affect the confessor's free will, a court must make explicit the purpose other than protecting that free will that is being served by suppression, at least if it is to engage in a principled analysis. When a court examines *pre-arraignment* delay and continues to insist that its determination is based solely on voluntariness, its explanation can serve only to confuse its readers and to mislead future courts. In sum, expanding the definition of "voluntary" seems to be nothing but a tautologic sleight-of-hand that hides the true basis for the suppression decision, Rule 5(a).[3]

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[3] We can best explain the nature of the "expanded voluntariness" approach by quoting from Lewis Carroll:

> "When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."

Lewis Carroll, The Annotated Alice: Alice's Adventures in Wonderland & Through the Looking Glass 269 (Martin Gardner ed., Bramhall House 1960) (1871); *see generally* Bix, *Michael Moore's Realist Approach to Law*, 140 U.Penn.L.Rev. 1293 (1992).

A more sophisticated version of the first mode of analysis has been adopted by the Seventh Circuit. In *United States v. Gaines*, 555 F.2d 618 (7th Cir. 1977), that circuit avoided the pitfalls of the Sixth Circuit's approach by recognizing both that there must be some circumstances in which delay in arraignment alone justifies suppression and that such suppression must be grounded on the interests incorporated in Rule 5(a), not on the interest in preventing coerced confessions, *see id.* at 623-24. The court did not, however, hold that all unreasonable delays in arraignment (outside the safe harbor period) require suppression of the confession (the *McNabb-Mallory* rule), but rather held that whether delay warranted suppression depended upon "the exercise of such judicial discretion depend[ing] upon a congeries of factors, including such elements as the deterrent purpose of the exclusionary rule, the importance of judicial integrity, and the likelihood that admission of the evidence would encourage violations of the Fourth Amendment." *Id.* at 623-24. The Seventh Circuit thus appears to have attempted to reconcile sections (a) and (c) through a compromise under which a Rule 5(a) volation alone may render a confession inadmissible, but does not necessarily do so.

The alternative approach to § 3501 recognizes that, while sections (a) and (c) are facially incompatible, they can best be understood by construing section (a) to address concerns regarding a confessor's free will and section (c) to address concerns regarding delay in arraignment. Such a construction is most consist-

ent with the legislative history, which demonstrates: (1) that section (a) was enacted in light of congressional concern over the Supreme Court's holding in *Miranda v. Arizona*, 384 U.S. 436 (1966), that confessions should be suppressed in certain circumstances without finding "the defendants' statements to have been involuntary in traditional terms," *id.* at 457. *See United States v. Robinson*, 439 F.2d 553, 562-63 (D.C. Cir. 1970); *id.* at 574 n.18 (McGowan, J., dissenting); Senate Report (Judiciary Committee) No. 1097, *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, 2123-40, 2282,[4] and (2) that section (c) was appended to the statute to address the *McNabb-Mallory* rule, *see* 114 Cong. Rec. 14,184-86. Given this history, and the fact that pre-arraignment delay is the exclusive subject of section (c), the approach concludes that it is *that* section that incorporates Congress' intent with regard to the admission of confessions made during an unreasonable delay in arraignment. As the Second Circuit has stated it,

> the additon of subsection (c) on the Senate floor effectively codified a limited *McNabb-Mallory* rule. Stated another way, section 3501 legislatively overruled the *McNabb-Mallory* rule only to the extent of (1) unreasonable pre-arraignment, pre-confession delays of less than six hours and (2) reasonable delays in excess of six hours.

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[4] Congress' attempt to address *Miranda* has been held not to overrule that decision, as such a result would be of questionable constitutionality, *see, e.g., Robinson*, 439 F.2d at 574 n.18 (McGowan, J., dissenting), but rather to guide the voluntariness inquiry under certain circumstances, *see, e.g.*, 439 F.2d at 562 & n.11.

Perez, 733 F.2d at 1035. Accordingly, a confession outside of the section (c) safe harbor is subject to the *McNabb-Mallory* rule, which mandates exclusion if the delay in arraignment is unreasonable. This approach is recommended by most commentators, *see, e.g.*, 3 J. Wigmore, Evidence § 862(a), at 623 (Chadbourn rev. 1970) (stating that § 3501 retains the *McNabb-Mallory* rule with regard to confessions obtained outside of the section (c) safe harbor); 8 J. Moore, Moore's Federal Practice ¶ 5.02[2], at 5-13-5-15 (2d ed. 1992) (same), and has been adopted by the Second and District of Columbia Circuits, *see Perez*, 733 F.2d at 1035; *United States v. Robinson*, 439 F.2d 553, 563-64 (D.C. Cir. 1970).

The leading Ninth Circuit decision regarding pre-arraignment delay is *United States v. Halbert*, 436 F.2d 1226 (9th Cir. 1970), which bears some similarities to the Sixth Circuit's "expanded-voluntariness" approach. In *Halbert*, we stated that non-safe harbor confessions "are admissible if voluntary, although the trial judge under subsection (b) may take into account delay in arraignment in his determination of voluntariness." *Id.* at 1237. *Halbert* differed from the Sixth Circuit's approach in one important aspect, however. Although it attempted to incorporate pre-arraignment delay within a "voluntariness" determination, it recognized that "[d]iscretion remains in the trial judge, under subsection 3501(b), to exclude confessions as involuntary solely because of delay in arraignment, during which a confession is given, that exceeds six hours." *Id.* at 1234. Our difference with the Sixth Circuit on this point sharpened as we reiterated our position on numerous occasions. *See, e.g., United States v. Fouche*, 776 F.2d 1398,

1406 (9th Cir. 1985) (stating that "the district court has the authority to exclude the [non-safe harbor] confession as involuntary, and may do so solely because of the pre-arraignment delay"); *Manuel*, 706 F.2d at 913 (9th Cir. 1983) ("Section 3501(c), by implication, provides that unreasonable pre-arraignment delay can provide the sole basis for a finding of involuntariness, if the delay exceeds six hours."). Thus, in a series of cases we have made it clear that suppression can be based on concerns other than the confessor's free will, although we did not say so explicitly. *Cf. United States v. Edwards*, 539 F.2d 689, 691 (9th Cir.) (finding that a confession was "voluntary" because, *inter alia*, "the delay in arraignment was caused solely by a shortage of personnel and vehicles to transport the suspect a distance of 125 miles to Tucson, the situs of the nearest available magistrate"), *cert. denied*, 429 U.S. 984 (1976).

In *United States v. Wilson*, 838 F.2d 1081 (9th Cir. 1988), we solidified our approach by making explicit the purposes for which delay in arraignment is considered in a § 3501 suppression hearing. In *Wilson*, we reversed the district court and ordered suppression of a confession obtained during a lengthy pre-arraignment delay, a delay extended in part in order to allow police officers time to interrogate the defendant. In finding the confession inadmissible, we did not state that the confessor's will had been overcome, but rather ordered suppression because

> [t]he purposes embedded in § 3501—to prevent confessions extracted due to prolonged pre-arraignment detention and interrogation, and *to supervise the processing of defendants from as*

> *early a point in the criminal process as is practicable*—are frustrated when the arraignment of a defendant who has been in custody for more than six hours is further delayed for no purpose other than to allow further interrogation of the defendant. If we countenance the police procedure followed here, we give officers a free hand to postpone any arraignment until a confession is obtained. That was not the legislative intent behind § 3501.

Id. at 1087 (emphasis added). *Wilson* thus makes explicit that a confession may be suppressed in order to serve the prophylactic purpose of discouraging officers from unnecessarily delaying arraignments (i.e., from volating Rule 5(a)) as well as to prevent admission of an involuntary confession. It also serves to bring us closest to the approach used by the Seventh Circuit.[5]

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[5] The dissent recites a long list of successors to *Halbert* in an unsuccessful attempt to demonstrate that in the past we have reviewed arraignment delays in excess of six hours exclusively for involuntariness, and not for unreasonableness. As we note elsewhere, *United States v. Edwards*, 539 F.2d 689 (9th Cir. 1976), *United States v. Manuel*, 706 F.2d 908 (9th Cir. 1983), and *United States v. Stage*, 464 F.2d 1057 (9th Cir. 1972) support the approach taken in *Wilson*. See discussion at [15a-16a; 18a] *supra*. *United States v. Mandley*, 502 F.2d 1103 (9th Cir. 1974), the only other case cited by the dissent, confined its analysis of § 3501 to quoting *Halbert*, and shed no light on the latter's use of the term "voluntariness". Moreover, while questioning our faithfulness to prior Ninth Circuit precedent, the dissent does not attempt to explain how its approach is consistent with *United States v. Sotoj-Lopez*, 603 F.2d 789 (9th Cir. 1979) (per curiam) (discussed below) and *Stage*.

Interestingly, despite our long line of cases following *Halbert*, we have never expressly chosen between an approach that requires suppression of non-safe harbor confessions if the court determines the delay to have been unreasonable (*McNabb-Mallory*) and an approach that allows admission of some non-safe harbor confessions given during an unreasonable delay in arraignment if the court believes that, on balance, suppression is not warranted. Although in *Halbert* we stated that the statute does not require that all confessions falling outside the safe harbor should be suppressed, *see id.* at 1232-33, that statement does not resolve the question. *McNabb-Mallory* and Rule 5(a) only require the supression of non-safe harbor confessions given during *unreasonable* delays in arraignment, not all non-safe harbor confessions.[6] Therefore, *Halbert* is not dispositive of the

[6] In this regard, it is important to note that under § 3501(c), not all reasonable delays *extend* the safe harbor, only those relating to difficulty transporting the defendant to the nearest magistrate, *see Wilson*, 838 F.2d at 1085 (Section 3501(c) "excuses delays for more than six hours *only* when such delay 'is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.' "). However, some delays that do not come within the safe harbor may be justified based on legitimate reasons other than difficulty in transportation; in those instances, the delay is deemed reasonable and there is no violation of Rule 5(a). *See, e.g., Evans v. United States*, 325 F.2d 596, 603-04 (8th Cir. 1963) (holding that Rule 5(a) was not violated by a 12 hour delay in arraignment incurred in order to search for stolen money), *cert. denied*, 377 F.2d 968 (1964); *see also supra* at [4a] (discussion test of reasonableness under *McNabb-Mallory*). Confessions obtained during such periods of "reasonable" delay are not excludible under *McNabb-Mallory*.

question whether the *McNabb-Mallory* bright line rule is applicable to non-safe harbor confessions.[7] Nevertheless, it is fair to state that most of our cases are more consistent with the Seventh Circuit balancing test than with the Second Circuit *McNabb-Mallory* bright line approach. *Compare Gaines*, 555 F.2d at 623 (7th Cir.) (asserting that its approach was consistent with *Halbert*) *with Perez*, 1033-34 (2d Cir.) (declining to follow *Halbert* but asserting that "the Ninth Circuit has not adhered consistently to the *Halbert* view").

There are at least two cases in which we followed the *McNabb-Mallory* approach. *See United States v. Soto-Lopez*, 603 F.2d 789 (9th Cir. 1979) (per curiam); *United States v. Stage*, 464 F.2d 1057 (9th Cir. 1972) (per curiam). In those cases, we suppressed non-safe harbor confessions on the basis of *McNabb-Mallory* without discussing *Halbert*. *See Sotoj-Lopez*, 603 F.2d at 790-91; *Stage*, 464 F.2d at 1057-58. On the basis of these post-*Halbert* cases, it might be possible to conclude either that the law of the Ninth Circuit is that *McNabb-Mallory* applies to non-safe harbor confessions or that we have an intra-circuit conflict. We need not resolve the matter, however, for we conclude that the confession before us must be excluded under either approach; thus resolution of any possible conflict is unnecessary. *See United States v. Whitehead*, 896 F.2d 432, 434 (9th Cir.), *cert. denied*, 111 S. Ct. 342 (1990); *United States v. Sotelo-Murillo*, 887 F.2d 176, 179 (9th Cir. 1989). In addition, we note that the conflict may be more apparent than real. Under *Sotoj-*

[7] Indeed, it is interesting that we were careful in *Halbert* to note that the delay did *not* violate Rule 5(a). *See* 436 F.2d at 1230.

Lopez, a court examines the delay in arraignment (if it falls outside of the safe harbor) to determine if it is unreasonable; only if the delay is unreasonable does it exclude the confession. Under *Halbert*, a court considers the delay in arraignment (again assuming that it falls outside the safe harbor) to determine whether or not it is the sort of delay that warrants suppression in light of a number of factors, including the prophylactic purpose "embedded" in § 3501. *See Wilson*, 838 F.2d at 1087. A strong argument can be made that the second inquiry also hinges on whether the delay is reasonable—that *Halbert-Wilson* simply provides an explicit set of criteria for determining reasonableness. In any event, as we have stated, we will not resolve this question as we find the result in this case to be the same whether we rely on *Halbert-Wilson* or *Sotoj-Lopez*.

III

In evaluating the admissibility of Alvarez-Sanchez's confession, we note that it did not occur during the § 3501(c) safe harbor period. It was obtained far longer than six hours after his arrest. Alvarez-Sanchez was taken into local custody on Friday, did not confess to federal authorities until Monday afternoon, and was not arraigned until Tuesday morning. Thus, the combined delay well exceeds the § 3501(c) six-hour safe harbor. *See United States v. Fouche*, 776 F.2d 1398, 1406 (9th Cir. 1985) (stating that "pre-arraignment delay caused by local and federal officials should be considered cumulatively under section 3501(c)").[8] We find no reason for extending the

[8] The government suggests that *Halbert* stands for the proposition that pre-arraignment delay by local and federal officials should be aggregated only when the defendant can show evidence of collusion between local and federal authorities. *Halbert* stands for no such proposition. Indeed, the court suggests the opposite rule, *see id.* at 1231 ("It can be argued that § 3501 removed the necessity of considering 'collusive working agreements.' "), and in any case expressly refrains from deciding the question, *see id.* at 1231, 1232 n.4. *Fouche*, however, does reach the issue and makes clear that pre-arraignment delay should always be aggregated.

safe harbor period as there was no claim of difficulty in transporting the defendant to the nearest magistrate. Thus, Alvarez-Sanchez's confession clearly falls outside the safe harbor, a point that the government has not contested.

IV

We now turn to the question of whether the confession should be excluded. Under the *McNabb-Mallory* approach followed in *Sotoj-Lopez*, the answer is clear. We need only look to one part of the delay in order to reach our conclusion. Alvarez-Sanchez's arraignment was delayed from Monday afternoon to Tuesday morning specifically to provide federal officers with time to interrogate him. Such a delay is one of the most patent violations of Rule 5(a) and suppression is required on the basis of that delay alone—irrespective of the lengthy delay that occurred between Friday and Monday. *See Upshaw v. United States*, 335 U.S. 410, 414 (1948); *Ginoza v. United States*, 279 F.2d 616, 621 (9th Cir. 1960) (en banc) (requiring suppression of a confession obtained during a delay "designed primarily for the purpose of enabling the officers to secure or to obtain the [confession]").

Under *Halbert*, we reach the same result. *Halbert* expressly provides that in some cases confessions should be suppressed solely on the basis of pre-arraignment delay. This is one of those cases. Because § 3501 has "embedded" within it the goal of speedy arraignments, *see Wilson*, 838 F.2d at 1087, the avoidable and deliberate delay engaged in here, after a long period of custody, for the sole purpose of interrogating the arrestee requires suppression of the confession.[9] Under the circumstances presented here, allowing police officers to interrogate an arrestee rather than to arraign him would encourage violations of Rule 5(a)—because it would permit the prosecution to profit by its wilful violations. As we stated in *Wilson*, "[i]f we countenance the police procedure followed here, we give officers a free hand to postpone any arraignment until a confession is ob-

[9] The government argues that finding the delay unreasonable here will establish a duty to arrest a defendant as soon as probable cause is established, in contradiction to *Hoffa v. United States*, 385 U.S. 293, 309-10 (1966). *Hoffa*, however, rejected a duty to arrest *and take into custody* a suspect once probable cause is established. It did not address the duty to arraign speedily a defendant *who is already in custody* and therefore a subject of the concerns expressed in 18 U.S.C. § 3501 and Fed. R. Crim. P. 5. The government does not deny the existence of a duty to arraign speedily a detained suspect. *See* Fed. R. Crim. P. 5 ("An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate."). It only denies the duty to arraign speedily a suspect who is in the state custody. *Fouche*, as has already been explained, rejects the government's position.

tained." *Id.* Accordingly, Alvarez-Sanchez's confession must be suppressed.[10]

Since there is no contention that admitting the confession was harmless, *cf. Arizona v. Fulminante*, 111 S. Ct. 1246, 1266 (1991) (Kennedy, J., concurring) (suggesting that, because of "the indelible impact a full confession may have on the trier of fact," a confession is seldom, if ever, harmless), and the evidence, including the erroneously admitted confession, was sufficient to support the verdict, the judgment of the district court must be vacated, the order denying the defendant's motion to suppress his confession must be reversed, and the case must be remanded to the district court for further proceedings in conformity with this opinion.

[10] Finally, we note that even were we to apply all the factors set forth in § 3501(b), we would conclude that the confession should be excluded. The first factor, delay in arraignment, weighs heavily in favor of suppression as the delay, from Friday to Tuesday, was almost four days in length. The fifth factor also weighs in favor of suppression because Alvarez-Sanchez was not represented by counsel. The second factor, whether the defendant understood the nature of the charges against him, does not weigh on either side, as the district court made no findings in this regard, although even if we assume Alvarez-Sanchez did understand, our result would be unaltered. The third and fourth factors weigh slightly in favor of admission because Alvarez-Sanchez waived his *Miranda* rights; however, the weight of these factors is greatly diminished because the waiver occurred only after he had been detained for over three days. *See Wilson*, 838 F.2d at 1087. Were we to balance all these factors, along with the unreasonableness of the delay in arraignment, we would conclude that suppression of the confession is required.

VACATED, REVERSED, AND REMANDED FOR FURTHER PROCEEDINGS.

PRICE, Senior District Judge, dissenting:

I respectfully dissent from the majority opinion in this matter.

After conviction by trial, the defendant appeals the order of the district court that denied his motion to suppress statements made to federal officers obained in violation of 18 U.S.C. § 3501. The facts as found and relied upon by the district court are as follows.

FACTS AND PROCEDURAL HISTORY

Defendant Pedro Alvarez-Sanchez was arrested by Los Angeles Sheriff's Deputies on narcotics charges on August 5, 1988, during the execution of a search warrant on defendant's residence. It is not clear whether the Los Angeles Sheriff's Department was told that the Los Angeles District Attorney's Office would decline prosecution (Declaration of Los Angeles Sheriff's Department Deputy Abraham Hernandez), or if the case was never presented to the District Attorney for a prosecutorial decision (Los Angeles Sheriff's Department Detective John McCann). However, because counterfeit money totaling $2,260.00 was recovered from defendant's residence, the Secret Service was notified on Monday, August 8, 1988.

At about 11:30 a.m. on August 8, 1988, defendant, while still in state custody, was interviewed by United States Secret Service Special Agents Lipscomb and Bozzuto, and Los Angeles Sheriff's Department Deputy Abraham Hernandez, the latter being fluent in Spanish. Defendant was advised of, and agreed to waive, his *Miranda* rights, and confessed to knowingly possessing counterfeit money. Defendant was taken into custody by the special agents in the afternoon of August 8, 1988.

After returning to the United States Courthouse in Los Angeles, California, the arresting officers proceeded to put the defendant through the necessary booking procedures. By the time they had completed these procedures, they were told that the magistrate's calendar was filled, and that the defendant could not be brought before a magistrate on August 8, 1988. Defendant was brought before the magistrate on the morning of August 9, 1988. An indictment was subsequently returned against the defendant charging him with possession of counterfeit money with the intent to defraud in violation of 18 U.S.C. § 472. He was convicted.

We are mandated to review the claimed violation of 18 U.S.C. § 3501 *de novo*. *United States v. Wilson* 883 F.2d 1081, 1083 (9th Cir. 1988).

DISCUSSION

At the time this case arose, Title 18 of the United States Code § 3501 read as follows:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (3) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that

the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confes-

sion made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any crim-

inal offense or any self-incriminating statement made or given orally or in writing.

18 U.S.C. § 3501 (emphasis added).[1]

This section was passed to ameliorate the effect of *Mallory v. United States*, 354 U.S. 449, 1 L.Ed.2d 1479, 77 S.Ct. 1356 (1957). The legislative history reveals the congressional view of the effect that *Mallory* was having on criminal prosecutions:

> Voluntary confessions have been admissible in evidence since the early days of our Republic. These inculpatory statements have long been recognized as strong and convincing evidence—often called the best evidence of guilt. In *Mallory v. United States*, 77 S.Ct. 1356, 354 U.S. 449 (1957), the U.S. Supreme Court declared inadmissible voluntary confessions made during a period of unnecessary delay between the time of arrest and the time the suspect is taken before a committing magistrate. The case of *Alston v. United States*, 348 F.2d 72 (D.C. Cir. 1965), is indicative of the illogical and unrealistic court decisions resulting from the application of the *Mallory* rule. The Honorable Alexander Holtzoff, U.S. district judge for the District of Columbia, testified before the subcommittee as follows:
>
> > On the other hand, the District of Columbia circuit takes an extreme position and practically holds that an arrested person must be taken to a magistrate immediately,

[1] The bill as originally passed, referred to "commissioners." The word "magistrate" was inserted wherever the word "commissioner" originally appeared.

> > even in the dead of night, subject to necessary time to make a record of the arrest, fingerprinting the defendant, and similar mechanical processes. This is illustrated by the case of *Alston v. United States*, 121 U.S.App.D.C. 66, 348 F.2d 72, in which the conviction of a self-confessed murderer whose guilt was not in dispute, was reversed. The facts are startling. The defendant was brought to police headquarters at 4:30 a.m. He was questioned by the police for about 5 minutes and then immediately confessed on the advice of his wife who had accompanied him with the police. It was held by the court of appeals that the arresting officers should have taken the defendant before a committing magistrate immediately and that the questioning, even for 5 minutes, was not permissible—the conviction was reversed. It is my understanding that the indictment thereafter was dismissed on the motion of the U.S. attorney in view of the fact that he felt that without the confession he did not have sufficient evidence to convict (Hearings, at 260-61).
>
> The rigid, mechanical exclusion of an otherwise voluntary and competent confession is a very high price to pay for a "constable's blunder."

S.Rpt. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 2112, 2124.

In *United States v. Halbert*, 436 F.2d 1226 (9th Cir. 1970), this court held that a voluntary confession given more than six hours after the defendant

was taken into custody by state officer was admissible.

The pertinent facts were as follows:

1. Defendant Halbert was arrested by state officers in the afternoon of November 11, 1969. He was booked in the Bowie, Arizona jail.

2. On November 12, between 9 and 10 a.m., state officials notified the FBI of the arrests and possible Dyer Act violation. The FBI received confirmation that the car in which the defendant had been arrested had been stolen in California.

3. On November 13, 1969, an FBI agent interviewed Halbert and obtained his confession at about 3:26 p.m.

4. The United States Attorney requested the FBI to determine if local authorities in Los Angeles would prosecute the defendant. They declined and so notified the Arizona FBI agents on November 13, 1969.

5. On Friday, November 14, 1969, FBI agent Bogley was assigned other routine duties and did not present the matter to the U.S. Attorney's Office in Arizona until Monday, November 17, 1969. A complaint was filed, and a warrant was issued. Halbert first appeared before the U.S. Magistrate on November 17, 1969.

The appellate panel's summary continued:

> Halbert moved to suppress the confession given in the interview on November 13 with Agent Bagley on the grounds that it was obtained in violation of (1) the Fifth amendment and Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), (2) Rule 5 of the Federal Rules of Criminal Procedure and Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957), and (3) 18 U.S.C. § 3501.

The district court granted the motion. The district court found (1) that a proper Miranda warning had been given, (2) that the confession was voluntary under 18 U.S.C. § 3501(b), but (3) that the delay between the state arrest and the confession and delay in holding a committing hearing was not reasonable under 18 U.S.C. § 3501(c). The precise finding on the latter issue was:

> "Not only was this confession not obtained within six hours of the arrest or detention, but the delay in holding defendant's committing hearing cannot be excused in light of 'the means of transportation and the distance to be traveled to the nearest such available magistrate or other officer.' "

Id. at 1226.

The *Halbert* panel held that 18 U.S.C. § 3501(c) does not automatically render *all* confessions made after 6 hours of detention inadmissible:

> Thus, subsection 3501(b) instructs the trial judge to consider delay in arraignment in determining the voluntariness of a confession but leaves him with a great deal of discretion on what to make of it. In this context, subsection 3501(c), in providing that confessions shall not be inadmissible solely because of delay in arraignment, if otherwise voluntary and given within six hours of arrest, merely removes some of the discretion given to the trial judge under

subsection 3501(b) in determining voluntariness. Discretion remains in the trial judge, under subsection 3501(b), to exclude confessions as involuntary solely because of delay in arraignment, during which a confession is given, that exceeds six hours.

This construction is consistent with the language of section 3501 and a scheme under which the admissibility of confessions turn on voluntariness. The integration, however, is not perfect. The effect of the proviso of subsection 3501(c) is to remove discretion from the trial judge by requiring him to admit a confession, otherwise voluntary, given more than six hours of arrest during a delay in arraignment if the delay was reasonable considering problems in transporting the defendant to the magistrate.

One must conclude then that subsection 3501(c) was intended to make voluntary confessions within six hours after arrest, clearly admissible without reference to delay. The provision as to confessions made more than six hours after arrest pinpointed an excuse for delay, caused by transportation and distance difficulties. After the express statements in § 3501(a) that the confession "shall be admissible in evidence if voluntarily given," and the statement in subsection 3501(b) that in determining the voluntariness the court shall take into account "the time elapsing between arrest and arraignment of the defendant making confession, if it was made after arrest and before arraignment," we cannot say that Congress intended by the provision in subsection 3501(c) to undo all it had done with

> the preceding subsections. The legislative history which we review hereafter clearly confirms our view, and we think it would be error to reach a different interpretation.

Id. at 1234.

The *Halbert* panel then discussed the legislative history and concluded that it supported their interpretation. The *Halbert* panel concluded:

> We conclude that confessions given more than six hours after arrest during a delay in arraignment are admissible if voluntary, although the trial judge under subsection 3501(b) may take into account delay in arraignment in his determination of voluntariness. The district court here found Halbert's confession voluntary under subsection 3501(b). This conclusion of the district court was correct. The confession was given two days after Halbert's arrest and he was, as discussed above, given the *Miranda* warnings. There was no evidence that he was subjected to oppressive police practices prior to his confession or that the delay between arrest and confession contributed in any way to the confession.
>
> The delay *after* the confession and before his federal arraignment obviously had no effect on the prior confession and would not render it inadmissible. United States v. Mitchell (1944), 322 U.S. 65, 64 S.Ct. 896, 88 L.Ed.2d 1140, United States v. Campbell (9th Cir. 1970), 431 F.2d 97, note 2.

Id. at 1237.

An examination of the cases which have involved an application of 18 U.S.C. § 3501 since *Halbert* is equally instructive.

In *United States v. Stage*, 464 F.2d 1057 (9th Cir. 1972), the defendant was arrested on August 20, 1970. Federal agents began questioning him soon after his arrest and gave Stage his *Miranda* warning on August 20, 1970. Stage indicated that he did not want to make any statements until he talked to an attorney. No attorney was ever furnished. On August 25, 1970, after a continued interrogation by state and federal officers, Stage filed a "waiver of rights" and confessed to a Dyer Act violation. His conviction was reversed and the case was remanded with instructions to dismiss the indictment.[2]

In *United States v. Mandley*, 502 F.2d 1103 (9th Cir. 1974), the defendant was arrested by state officers on December 26, 1973 for a parole violation. Wanted by the FBI, a federal hold was placed upon him. When his parole hearing occurred on January 7, 1974, the disposition of the state parole charge was postponed until disposition of the federal charges. On January 19, 1974, federal agents interviewed Mandley. He signed a waiver of his *Miranda* rights and confessed, following a two hour interview. Mandley was taken before a magistrate on January 14, 1974, nineteen days after his initial arrest, and seven days after the state hearing was suspended. The Ninth Circuit panel held that the confession was admissible, stating:

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[2] One member of the panel dissented, but agreed that the confession of Stage was not admissible.

> Prior to enactment of 18 U.S.C. § 3501 appellant's contentions could well have had merit under Rule 5, Federal Rules of Criminal Procedure, and Supreme Court decisions in McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 37 L.Ed. 819 (1943), and Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957). Section 3501 has, however, substantially changed the law.

United States v. Mandley, 502 F.2d at 1105.

In *United States v. Edwards*, 539 F.2d 689 (9th Cir. 1976), a rape occurred on an Indian reservation in Arizona on November 1, 1975. After a preliminary investigation, the United States Attorney authorized prosecution of the defendant. The FBI notified the Bureau of Indian Affairs that it could make the arrest. After his arrest on November 4, 1975, the defendant signed a waiver of his rights and an admission was obtained approximately 7 hours after being taken into custody and before being taken before a magistrate. The panel affirmed the trial court's finding that the confession was volunary.

In *United States v. Manuel*, 706 F.2d 908 (9th Cir. 1983), the following events occurred. On August 3, 1981, the body of one Howard was found on an Arizona road. On August 4, 1981, Manuel and two other suspects were arrested. All three were heavily intoxicated, and a decision was made to allow the defendants to sleep off the effects of the alcohol. On August 5, 1981, Manuel was questioned by FBI Agent Fish, starting shortly after 8:00 a.m. After being instructed as to his *Miranda* rights, Manuel confessed his role in the killing of Howard. Following this interview, the United States Attorney au-

thorized prosecution of Manuel, but did not authorize arrest. The Indian tribe declined to prosecute, and on November 21, 1981, Manuel was indicted. The appellate panel affirmed the trial court's determination that the confession was admissible at trial, stating:

> We find nothing in the record that would exclude Manuel's confession. The delay between his arrest and interrogation was reasonable under the circumstances. Uncontradicted testimony showed that Manuel was very heavily intoxicated when arrested on the afternoon of August 4. Questioning him in such a condition would have been much more likely to produce an unfair and involuntary confession than the procedure actually used. The tribal police provided Manuel with a meal and with sleeping accommodations so that he could regain sobriety. Although we do not sanction delay of any kind in bringing an accused person before a magistrate, delay engendered by such humanitarian motives can hardly be deemed unreasonable per se. *See United States v. Isom*, 588 F.2d 858, 862 (2d Cir. 1978); *United States v. Bear Killer*, 534 F.2d 1253, 1257 (8th Cir.), *cert. denied* 429 U.S. 846, 97 S.Ct. 129, 50 L.Ed.2d 118 (1976). Under the circumstances of this case, the delay did not render the appellant's confession involuntary.
>
> Apart from the delay, appellant does not seriously contend that the incriminating statements he made on the morning of August 5 were involuntary. The district court specifically found the confession to be voluntary. We cannot say that this finding was incorrect; it was supported by evidence that FBI agent Fish carefully explained to Manuel his *Miranda* rights prior to beginning the questioning, which immediately elicited Manuel's confession. We find that the district court properly applied the standard of 18 U.S.C. § 3501(b) to admit Manuel's confession, *see United States v. Mandley*, 502 F.2d 1103, 1105 (9th Cir. 1974); *Halbert*, 436 F.2d at 1237.

In *United States v. Wilson*, 838 F.2d 1081 (9th Cir. 1988), the Navajo Tribal Police Department received a call on May 3, 1985 regarding an unconscious child at the Public Health Service Hospital. The child's mother told the Tribal Police her common law husband had spanked the child with a shoe. The FBI in Gallup, New Mexico was notified. The FBI instructed the Navajo police to get a written statement from the mother and to keep the FBI informed. Wilson was arrested by tribal officers later the same day. He was placed in solitary confinement and special security precautions were taken to monitor him frequently during his custody upon their arrival at the tribal jail.

Sgt. Hawkins told the FBI agents that Wilson was to be arraigned on the tribal charges that day. He further stated that if the court started taking arraignments during their interview, he would make arrangements to take Wilson before the judge himself after the agents had finished the interview.

FBI Agents Babcock and Coffman started their interview sometime between 1:00 and 1:30 p.m. on May 10, 1985. The court's summary of this interview is as follows:

Agents Babcock and Coffman spoke with Wilson for more than two hours. Preliminary questioning revealed that Wilson had only a seventh grade education and had been arrested only on tribal or drinking offenses. Agent Babcock then read Wilson his *Miranda* rights, and asked Wilson to read them to himself, then aloud. Wilson declined to have his rights read to him in the Navajo language. He said he understood his rights and would talk to the agents about his son. The agents questioned Wilson about Melvin for approximately 1 hour and 42 minutes. Wilson thrice denied abusing his son. Agent Babcock told Wilson that he was lying and that it would be easier for him if he "got it off his chest." Babcock then asked Wilson whether he had been a victim of child abuse himself. At this point, Wilson broke down and started crying. He then confessed to having abused Melvin.

> The FBI concluded its questioning at approximately 4:00 p.m., by which time the tribal court, which met upstairs in the same building, had completed the day's arraignments. Because he was being questioned, Wilson missed the regularly scheduled arraignment calendar. After Wilson confessed, Sgt. Hawkins took him up to the judge's chambers to be arraigned specially.

United States v. Wilson, 838 F.2d at 1083.

The *Wilson* panel reversed the trial court's determination that Wilson's confession was voluntary stating:

> The government's reliance on the waiver of *Miranda* rights becomes weaker as the period

> of pre-arraignment detention increases. If unreasonable delay in excess of six hours can itself form the basis for a finding of involuntariness, that same delay may also suggest involuntariness of the *Miranda* waiver. *See Frazier v. United States*, 419 F.2d 1161, 1167 (D.C.Cir. 1969) (noting that the government's "already 'heavy burden' of showing effective waiver increases with the delay between arrest and confession).
>
> Given our holding in *Fouche* and the long delay which undermines a valid waiver of Wilson's *Miranda* rights, we cannot say that Wilson's apparent waiver of his rights to remain silent and to have an attorney present will overcome the other factors which support a finding of involuntariness. The purpose embedded in § 3501 —to prevent confessions extracted due to prolonged pre-arraignment detention and interrogation, and to supervise the procession of defendants from as early a point in the criminal process as is practicable—are frustrated when the arraignment of a defendant who has been in custody for more than six hours is further delayed for no purpose other than to allow further interrogation for the defendant. If we countenance the police procedure followed here, we given [*sic*] officers a free hand to postpone any arraignment until a confessions [*sic*] obtained. That was not the legislative intent beyond [*sic*] § 3501. It was error to deny the suppression motion.

Id. at 1087.

The *Halbert* analysis, and the cases that have followed make it clear that 18 U.S.C. § 3501(a), (b),

and (c) should be construed together. The failure to bring a defendant before a magistrate within six hours of his or her arrest does not, in and of itself, render a confession given in the interim inadmissible. The Court's inquiry should center on all of the facts and circumstances, surrounding the confession to determine if it was voluntarily given.

In the case before the Court, there is no evidence that any delay in bringing Alvarez before the magistrate was used to lengthen the interrogation of this defendant. Further, the defendant knew the nature of the charges pending against him.

As the defendant was being booked, and not in response to any specified question, he asked, "is this about the counterfeit money?" The defendant admitted possession of the counterfeit money shortly after the beginning of the interrogation by Special Agents Lipscomb and Buzzuto of the Secret Service.

I would affirm the ruling of the trial court denying defendant's motion to suppress, and would affirm defendant's conviction.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 88-671 (CBM)

UNITED STATES OF AMERICA, PLAINTIFF

v.

PEDRO ALVAREZ-SANCHEZ, DEFENDANT

ORDER

[Filed Oct. 2, 1988]

This matter is before the Court on defendant's motion to suppress statements made in violation of *Miranda* and for an evidentiary hearing on the voluntariness of defendant's statements, pursuant to 18 U.S.C. 3501.

FACTS AND PROCEDURAL HISTORY

Defendant Pedro Alvarez-Sanchez was arrested by Los Angeles Sheriff's deputies on narcotics charges on August 5, 1988 during the execution of a search warrant on defendant's residence. It is not clear whether the Los Angeles Sheriff's Department was told that the Los Angeles District Attorney's Office would decline prosecution (Declaration of Los Angeles Sheriff's Deparment Deputy Abraham Hernan-

dez) or if the case was never presented to the District Attorney for a prosecutorial decision (Los Angeles Sheriff's Department Detective John McCann), but because counterfeit money (totaling $2,260.00) was recovered from defendant's residence, the Secret Service was notified.

On August 8, 1988, defendant, while still in state police custody, was interviewed by United States Secret Service Special Agents Paul J. Lipscomb and Bozzuto and Los Angeles Sheriff's Department Deputy Abraham Hernandez, the latter apparently fluent in Spanish. The defendant was advised of, and agreed to waive, his *Miranda* rights and confessed to knowingly possessing counterfeit money. Defendant was taken into custody by the special agents in the afternoon of August 8 and was brought before the magistrate in the morning of August 9. An indictment was subsequently returned against the defendant charging him with possession of, with the intent to defraud, counterfeit money, in violation of 18 U.S.C. 472.

CONTENTIONS

Defendant bases his motion to suppress and for an evidentiary hearing upon two contentions: (1) that the defendant's confession was made without a voluntary and knowing waiver of his constitutional rights in violation of *Miranda*; and (2) that the delay between arrest and arraignment, during which the confession was made, renders the confession inadmissible under 18 U.S.C. 3501(c).

The government contends that defendant's statements were the result of a voluntary, intelligent and knowing waiver of his rights and that defendant's statements are not rendered inadmissible under 18

U.S.C. 3501(c) because delay in arraignment is not conclusive on the issue of voluntariness of a confession, but must be considered in light of the totality of the circumstances.

DISCUSSION

A. *Voluntariness, in general*

In order to introduce statements obtained from a defendant during custodial interrogation, the government must advise the accused of his right to remain silent and of his right to have counsel present during questioning. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Fare v. Michael*, 442 U.S. 707 (1979). One precondition for a voluntary custodial confession is a voluntary and knowing waiver of *Miranda* rights. *U.S. v. Heredia-Fernandez*, 756 F.2d 1412 (9th Cir. 1985).

When the voluntariness of a statement is brought into question, due process requires that the trial judge determine the voluntariness of the confession outside the presence of the jury. *Jackson v. Denno*, 378 U.S. 368 (1964).

18 U.S.C. 3501(b) sets forth some of the factors that should be considered in making this determination:

> The judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was sus-

pected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The government bears the burden of establishing, by a preponderance of the evidence, that an inculpatory statement by the defendant was voluntarily made. *Lego v. Twomey*, 404 U.S. 477 (1972).

In the instant case, the defendant was apparently advised of his rights in Spanish, both orally and by way of a written card, by Deputy Hernandez in the presence of Special Agents Lipscomb and Bozzuto. Defendant verbally indicated his understanding of these rights and his arrest to waive them and also signed a written waiver thereto. Defendant now contends that he did not understand his rights (both in terms of their significance and in terms of the language in which they were given), and that his waiver, accordingly, was not voluntary and knowing.

The determination of voluntariness depends upon the totality of the circumstances surrounding the taking of the statement and how these affected the individual defendant, *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973), and must be made considering the background, experience and conduct of the accused. *U.S. v. Rodriguez-Gastelum*, 569 F.2d 482, 488 (9th Cir. 1972), *cert. denied*, 436 U.S. 919 (1973).

Application of these factors to the instant case mandates the conclusion that defendant's statements during interrogation were, in fact, voluntarily, intelligently and knowingly made.

Clearly, the fact that the defendant orally affirmed his waiver and signed a written waiver does not, in itself, establish the voluntariness of a waiver. However, the defendant's conduct surrounding the statements—i.e., his prior experience as a police officer in Mexico, the conversation between defendant and Deputy Hernandez appeared to be relaxed, defendant appeared to understand Deputy Hernandez, and when questioned in detail, defendant said he didn't want to say anything more—establishes the voluntariness of a waiver.

B. *Voluntariness and Delay in Arraignment*:

18 U.S.C. 3501(c) provides in pertinent part:

> In any criminal prosecution . . . a confession made by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law enforcement officer . . . , shall not be inadmissible solely because of delay in bringing such person before a magistrate . . . if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation in this subsection shall not apply in any case in which the delay in bringing such person before the magistrate . . . beyond such six-hour period is found

> by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate . . .
>
> (Emphasis in original).

Where delay in arraignment during which a confession is given exceeds six hours, the district court retains discretion to exclude the statements as involuntary. *U.S. v. Halbert*, 436 F.2d 1226 (9th Cir. 1970); *U.S. v. Wilson*, 838 F.2d 1081 (9th Cir. 1988).

It is well established, however, that delay is only one factor to be considered, in light of all the surrounding circumstances, in determining the voluntariness of a confession. *U.S. v. Edwards*, 539 F.2d 689, 691 (9th Cir. 1976), *cert. denied*, 729 U.S. 984; and that lapse of time between arrest and arraignment, standing alone, does not require the exclusion of a statement made during that period. *U.S. v. Beltran*, 761 F.2d 1 (1st Cir. 1985).

The court in *U.S. v. Halbert*, *supra*, performed an exhaustive analysis of 18 U.S.C. 3501 and held that it did not preclude the introduction of a confession given to a federal officer by a defendant while in state custody during a delay in arraignment in excess of six hours of the defendant's arrest. In *Halbert*, the confession which the court held to be admissible was given two days after the arrest and four days prior to the filing of federal charges.

Addressing whether an exclusionary provision should be implied under section 3501, the court stated that ". . . on its face subsection 3501(c) provides only that *some confessions shall be admitted. It does not explicitly provide that all other confessions shall not be admissible.*" (emphasis in original).

Looking to the legislative history behind the section, the court provided that such exclusion of confessions should not be implied because the intent behind the statute was to remove delay alone as a cause for rejection of a suppression while making the voluntary character of the confession the real test of admissibility, and that the provision was not intended to make the law more restrictive. *Id.* at 1232.

The *Halbert* court quotes the Senate Judiciary Committee Report on the enactment of subsection 3501(c), which states

> The section also assures that confessions made while the suspect is under arrest shall not be inadmissible solely because of delay in bringing the defendant before a magistrate . . ."

Halbert, 436 F.2d at 1236 (quoting Senate Report No. 1097, U.S. Code Cong and Adm. News).

The court in *Halbert* thus held that while the statute does not imply exclusion of a voluntary confession given more than six hours after arrest, the judge may consider delay in its determination of voluntariness, and that the determining factor in whether a confession is admissible is not the period of custody or the amount of time elapsing between arrest and confession but, rather, the nature of the police activities during this period. *Halbert*, 436 U.S. at 1230 (quoting *Smith v. U.S.*, 309 F.2d 401 (9th Cir. 1968)). (*See, also, Cote v. U.S.*, 357 F.2d 789 (9th Cir. 1966), *cert. denied*, 385 U.S. 883 (1967)).

The defendant relies upon *Wilson*, *supra*, to support his claim that the statements should be sup-

pressed under section 3501(c). In *Wilson*, however, the delay in arraignment was found to be deliberate, and for the sole purpose of obtaining a confession, a finding based on testimony that although he knew the defendant was to be arraigned, the police officer intentionally delayed the arraignment until the interrogation was completed and the confession obtained. *Wilson*, 838 F.2d at 1085.

Using the standard set forth in *Halbert*, the determination of whether the delay in the instant case is probative of the involuntariness of the defendant's confession depends upon the nature of the police activities during the delays, as well as the reason for the delay.

Where, as in the instant case, statements are made during interviews of persons in state custody by federal officers, these statements have been deemed admissible even if exceeding the time limitation under section 3501(c), provided that there is no collusive working arrangement between state and federal officers to circumvent the federal rule requiring arraignment without unnecessary delay, *U.S. v. Chadwick*, 415 F.2d 167 (10th Cir. 1969), or no evidence that the state custody was the result of an improper arrangement with federal agents. *U.S. v. Greer*, 566 F.2d 472 (5th Cir. 1978).

The Ninth Circuit has held that the period of state custody can be considered in determining whether the confession or admission was voluntary. *Smith v. U.S.*, 390 F.2d 401 (9th Cir. 1968). However, as stated in *Smith*, "The determining factor is not the amount of time elapsed between arrest and arraignment but, rather, the nature of police activity during the period." Where the confessing defendant has been

arrested by state officers and subsequently interrogated and detained by federal officers, the relevant delay in arraignment for purposes of section 3501(c) has been measured, by at least one circuit, from the commencement of federal detention where there is no proof of a working arrangement between the state and federal agencies. *U.S. v. Davis*, 459 F.2d 167 (6th Cir. 1972).

In contrast to the situation presented in *Wilson*, *supra*, there is no evidence in the instant case that the delay in arraignment was for the sole purpose of obtaining a confession or was the result of oppressive police practices prior to obtaining the confession, or that the delay otherwise caused the confession.

Evidence in the form of the agents' testimony and affidavits establishes that the defendant was taken into federal custody, transported, processed, fingerprinted and photographed immediately upon interrogation, and that arraignment was delayed until the next morning only because, due to the lateness of the day, the magistrate's calendar was full once booking was completed.

Delay in arraignment after confession due to preparation of the complaint and warrant does not render the confession involuntary under 18 U.S.C. 3501. *U.S. v. Davis*, 532 F.2d 22 (7th Cir. 1976); *U.S. v. Beltran, supra.*

Likewise, time spent in routine processing cannot be considered unnecessary or unreasonable for purposes of a delay in arraignment. *U.S. v. Johnson*, 467 F.2d 630 (2nd Cir. 1972), *cert. denied*, 410 U.S. 932 (1973). The Court will also consider whether a weekend day is involved in the delay in determining its reasonableness. *U.S. v. Shoemaker*, 542 F.2d 561

(10th Cir. 1976), *cert. denied*, 429 U.S. 1004 (1977). Two of the days between arrest and arraignment in this case were weekend days.

Although the federal agents, undoubtedly familiar with administrative and arraignment proceedings, could probably have expedited defendant's arraignment (perhaps by at least checking with the magistrate's clerk prior to the time, rather than after, the defendant was processed), arraignment could not, as defendant has argued, have taken place immediately upon interrogation because no federal charges had yet been filed, and the defendant had not yet been booked.

The delay *after* the confession and before the defendant's federal arraignment obviously has no effect on the prior confession and would not render it inadmissible. *Halbert* at 1237.

The delay in arraignment thus did not affect the voluntariness of the defendant's confession; therefore, suppression is not warranted.

The defendant offered no evidence that a collusive arrangement between state and federal agents for purposes of obtaining the confession, or that the delay or any oppressive tactics therein, caused the confession to be made.

Defendant's motion for a *Jackson v. Denno* hearing is GRANTED. Defendant's motion to suppress is DENIED.

IT IS SO ORDERED.

DATED: Dec. 2, 1988

/s/ Consuelo B. Marshall
CONSUELO B. MARSHALL, JUDGE
United States District Court

APPENDIX C

DECLARATION OF S.A. PAUL J. LIPSCOMB

1. I am a Special Agent (SA) of the United States Secret Service (USSS). I have been a Special Agent for eight and one half years. I am currently assigned to the Los Angeles Field Office, Counterfeit Squad.

2. On August 8, 1988, the Secret Service was advised by telephone that the Los Angeles County Sheriff's Department had arrested Pedro Sanchez Alverez subsequent to a search warrant being executed on his residence for narcotics. The search and arrest had occurred on August 5, 1988. We were also informed that the search had revealed one hundred and thirteen (113) counterfeit $20 Federal Reserve Notes in a jacket belonging to Alvarez.

3. Special Agent Bozzuto and I drove to the City of Industry sheriff's station, where we arrived between eleven and eleven thirty in the morning. We were met by Los Angeles Sheriff's Deputy Hernandez and Detective John McCann.

4. We went to an interview room, where defendant Pedro Sanchez Alvarez was brought and introduced to us by Deputy Hernandez. Deputy Hernandez spoke to Mr. Alvarez in Spanish, and translated our statements to Alvarez and his to us.

5. I first asked Deputy Hernandez to advise defendant of his constitutional rights under *Miranda*. Deputy Hernandez read to defendant the advise of rights in Spanish, then gave defendant the card containing the written statement of rights. Defendant said he was willing to talk to us, and marked the

card to indicate that he understood his rights and was waiving them. He then signed the card.

6. Defendant Alvarez stated that he was willing to discuss the facts of the case with us, and that he knew what this was all about, since he was at one time a police officer in Mexico.

7. The conversation between defendant and Deputy Hernandez appeared to be very free, and defendant was not at all hesitant in his responses. He did not appear to have any problem understanding Deputy Hernandez.

8. When Deputy Hernandez asked defendant if he knew the currency was counterfeit, defendant said "si," nodding his head up and down, and then said "yes" in English.

9. When he began to question defendant about his source of the counterfeit, or his knowledge of the source, he asserted his rights and said he didn't want to talk anymore. He said he was willing to discuss the facts of his personal involvement as much as we wanted, but would not involve anyone else, or say where he got it.

10. Upon defendant's assertion of his right to be silent, the interview was terminated. Special Agent Bozzuto and I took the defendant into custody and transported him to the Los Angeles field office of the United States Secret Service. He was then processed by the taking of a brief personal history, fingerprinted, and photographed.

11. Because it was then almost four in the afternoon, it was too late to get on the magistrate's calendar for that day. We therefore transported defendant to Parker Center where he was housed for the night. The next morning we picked him up, took

him to the Los Angeles field office en route to the marshal's lockup, then to the magistrate's courtroom for morning calendar. The matter was delayed until the afternoon calendar to allow pre-trial services the opportunity to verify some of the information received during interview of the defendant.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

PAUL J. LIPSCOMB

APPENDIX D

DECLARATION OF DEPUTY ABRAHAM HERNANDEZ

1. I am a deputy sheriff with the Los Angeles Sheriff's Department. I have been so employed for the last thirteen years.

2. I am a native Spanish speaker, and fluent in both Spanish and English, and receive additional compensation from the Los Angeles Sheriff's Department for my bi-lingual skills.

3. On August 5, 1988, I participated in the search of 3025 Frazier Avenue, Apartment D, in the city of Baldwin Park, pursuant to a search warrant obtained earlier that day by Detective John McCann. A copy of the search warrant and affidavit is attached hereto as exhibit 1.

4. During the search, we located one hundred thirteen (113) counterfeit $20 Federal Reserve Notes in a sleeveless vest jacket, which was found in a closet. Also found were two rent receipts for the address, made out to Pedro Alvarez.

5. Pedro Alvarez was arrested in connection with the narcotics which were located in the apartment. On August 8, 1988 we were informed that prosecution would be declined by the District Attorney.

6. On August 8, 1988, the Secret Service was informed of the discovery of the counterfeit currency.

7. On August 8, 1988, sometime before noon, Secret Service Agents Paul Lipscomb and John Bozutto came to the City of Industry Sheriff's office. Theye were shown the seized currency and took possession of it.

8. Pedro Alvarez was brought to an interview room, and I introduced him to Special Agents Lipscomb and Bozutto. Detective McCann was also present.

9. Special Agent Lipscomb asked me to advise Alvarez of his constitutional rights under Miranda. Alvarez told me that he did not read Spanish, so I read the card to him. I asked him if he had any questions at all regarding his rights, and he said no. I then asked if he wanted an attorney, and he said no. I asked if he was willing to talk, and he said, "Si, como no," or "Yes, why not?" I placed the card before him, and he indicated on the card that he understood his rights and wanted to waive them. He then signed the card.

10. Alvarez said that he was willing to discuss the facts of the case, and that he knew what this was all about, since he had been a police officer, a state police officer, and a government police officer in Mexico.

11. The conversation between myself and Alvarez seemed very easy and comfortable, and he was not at all hesitant in his responses. He did not appear to have any problem understanding me, and I did not have any problem understanding him.

12. When I asked Alvarez if he knew the currency was counterfeit, he said "si," nodding his head up and down, and then said "yes" in English.

13. When I began to question Alvarez about his source of the counterfeit, or his knowledge of the source, he asserted his rights and said he didn't want to talk anymore. He said he was willing to discuss the facts of his personal involvement as much as we wanted, but would not involve anyone else, or say where he got it.

14. Upon Alvarez' assertion of his rights, the interview was terminated. Special Agents Lipscomb and Bozutto took him into custody and left the station.

I declare under penalty of perjury that the foregoing is true and correct to best of my knowledge.

ABRAHAM J. HERNANDEZ

APPENDIX E

DECLARATION OF DETECTIVE JOHN McCANN

1. I am a detective with the Los Angeles Sheriff's Department. I have been with the Sheriff's Department for 23 years. I am the officer in charge of the investigation of Pedro Sanchez Alvarez.

2. On August 5, 1988, I obtained a search warrant for the residence located at 3025 Frazier Avenue, Apartment D, in the city of Baldwin Park. A copy of the search warrant and supporting affidavit are attached hereto as Exhibit 1.

3. The search warrant was executed on August 5, 1988. The suspect Sanchez was standing outside the door of the residence as we approached. He was detained, and taken into the residence while the search was conducted.

4. During the search, we located one hundred thirteen (113) counterfeit $20 Federal Reserve Notes in a sleeveless vest jacket, which was found in a closet. Also found were two rent receipts for the address, made out to Pedro Alvarez.

5. Pedro Alvarez was arrested at approximately 3:30 p.m. in connection with the narcotics which were located in the apartment. He was booked at approximately 5:40 p.m. Pursuant to state law, I had until Tuesday morning to present the case to the state prosecutor for a decision, and for him to be arragined on the state charges.

6. It is department policy that the Secret Service be informed in any case where counterfeit money is found. Therefore, on August 8, 1988, I telephoned the Secret Service to informed them of the discovery of the counterfeit currency.

7. Secret Service Special Agents Paul Lipscomb and John Bozutto came to the City of Industry Sheriff's office. I showed them the seized currency, and they took possession of it. Pedro Sanchez was brought to an interview room, where Deputy Hernandez, who speaks fluent Spanish, introduced him to Agents Lipscomb and Bozutto.

8. Special Agent Lipscomb asked Deputy Hernandez to advise Alvarez of his constitutional rights. Deputy Hernandez read to defendant the advisement of rights in Spanish, then gave defendant the card containing the written statement of rights. Defendant said he was willing to talk to us, and marked the card to indicate that he understood his rights and was willing to waive them. He then signed the card.

9. Sanchez said that he was willing to discuss the facts of the case, and that he knew what this was all about, since he had been a police officer in Mexico.

10. The conversation between Sanchez and Deputy Hernandez appeared to be very relaxed, and defendant was not at all hesitant in his responses. He did not appear to have any problem understanding Deputy Hernandez.

11. When Deputy Hernandez asked Sanchez if he knew the currency was counterfeit, Sanchez said "si," nodding his head up and down, and then he said "yes" in English.

12. When Sanchez was questioned for details about his source of the counterfeit currency, he said he didn't want to say anything more. He said he was willing to discuss the facts of his personal involvement, but would not involve anyone else, or say where he got the currency.

13. The interview was then terminated. Special Agents Lipscomb and Buzutto took Sanchez into custody and left.

14. This case was never presented to the District Attorney for a prosecutorial decision. Had the Secret Service decided not to presecute [*sic*] this defendant federally, I would have presented both the narcotics and counterfeit violations to the District Attorney.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

JOHN MCCANN

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 89-50060
D.C. No. CR-88-0671-CBM

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

PEDRO ALVAREZ-SANCHEZ, DEFENDANT-APPELLANT

[Filed: Jan. 22, 1993]

ORDER

Before: D.W. NELSON and REINHARDT, Circuit and PRICE*, Senior District Judge

Judges D.W. Nelson and Reinhardt voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Price recommended granting the petition for rehearing and accepting the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Edward Dean Price, Senior District Judge for the Eastern District of California, sitting by designation.

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